STATE OF NORTH CAROLINA

COUNTY OF MECKLENBURG

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
Case No. 18-CVS-11280

ROBERT M. PITTENGER and wife, SUZANNE B. PITTENGER

Plaintiff,

V.

GLENEAGLES HOME ASSOCIATION, a North Carolina Nonprofit Corporation, RICHARD B. BOOTH, JR., as an Officer and Director of GLENEAGLES HOMES ASSOCIATION, KEVIN J. ROCHE, as an Officer and Director of GLENEAGLES HOMES ASSOCIATION, DWIGHT H. BERG, individually and as an Officer and Director of GLENEAGLES HOMES ASSOCIATION, and DOUG L. LEBDA (a/k/a DOUGLAS R. LEBDA) AND MEGAN GRUELING,

Defendant.

DEFENDANTS DOUG L. LEBDA AND MEGAN GREULING'S RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO FILE A SUPPLEMENTAL COMPLAINT

Defendants Doug Lebda ("Lebda") and Megan Greuling ("Greuling") (or collectively "defendants") hereby submit this brief in opposition to Plaintiffs Robert M. Pittenger and Suzanne B. Pittengers (the "Pittengers") Motion for Leave to Supplement their Complaint (the "Motion").

INTRODUCTION

The Pittengers have filed a Motion to Supplement their Complaint pursuant to Rule 15(d) of the North Carolina Rules of Civil Procedure nearly ten months after these new allegations occurred and at least ten months since the discovery in this matter closed. The claims set forth in the proposed supplemental complaint are said to have occurred on May 28, 2019, and August 15, 2019. (ECF 77.1 ¶¶ 114-122). One claim is that the defendants found financial papers

pertaining to the Pittengers in a broken open FedEx package in the road in front of their house and returned them to the Pittengers' attorney the next day via their attorney (the undersigned). Secondly, the Pittengers complain that the defendants spied upon them or invaded their privacy by having taken drone videos of the street where the Pittengers and Lebdas live, including a video of the exterior of the Pittenger house. The purported claims do not directly relate to the allegations set forth in the Amended Complaint but set out new causes of action for conduct unrelated to the Pittengers' original allegations. Discovery in this case has been concluded for months, nearly a year. Summary judgment motions in this matter were filed in September of 2019, and oral arguments took place in December 2019. Given the significant lapse in time that has occurred between the dates of the purported new claims, the request for amendment is not timely. Allowing this supplemental complaint to move forward will result in significant prejudice to Lebda and Greuling, as well as the other defendants in this case. Once the court issues a decision on the pending motions, the case will either be dismissed, or a trial date will be set with the case literally ready for trial procedurally. If the court saw fit to grant this motion, then the trial would have to be delayed while motions practice and discovery took place, or else the defendants would have to defend the new claims without discovery, which would be unfair. At the best, a delay of many months would take place, a result which seems unfair given the volume of discovery and preparation that has already taken place.

CASE OVERVIEW/PROCEDURAL HISTORY

The Pittengers filed their Complaint on June 6, 2018 in Mecklenburg Superior Court against the Association, related officers and directors, and Lebda and Greuling (ECF No. 3). The Pittengers filed an Amended Complaint on June 20, 2018. (ECF No. 4). All Defendants have filed answers to both the Complaint and Amended Complaint. (ECF No. 9, 11-12). On October

29, 2019, the Pittengers filed a Voluntary Dismissal of Certain Claims, which included the negligence, gross negligence, and punitive damage claims against Lebda and Greuling. (ECF No. 66). Currently, the only remaining claim against Lebda and Greuling is the Pittengers' first cause of action in which the Pittengers allege a violation of covenants, conditions, and restrictions and in which they seek a declaratory judgment from the Court. (ECF No. 3). The parties conducted extensive discovery in this case, including intensive document production and multiple depositions of fact and expert witnesses.

On January 30, 2019, the Association, Booth, Roche, and Berg filed a 12(c) Motion for Judgement on the Pleadings. (ECF No. 28). On September 30, 2019, Lebda and Greuling, along with the remaining defendants, moved for summary judgment on all claims that were pending before the Court. (ECF No. 52, 55). The Court held oral argument on December 10, 2019 on Lebda and Greuling's Motion for Summary Judgment, along with the remaining defendants' Motion for Summary Judgment and Motion for Judgment on the Pleadings. (ECF No. 69). The Court took those matters under advisement, and an order from the Court is pending.

A timeline of the events alleged in the new filing may be instructive regarding the lateness of the filing. On the day the financial documents were found in the road, all parties had attended a Rule 34 inspection of the Lebda/Greuling residence. Mrs. Greuling was out walking her dogs that evening and noticed the package in the street. Concerned that these financial documents were just lying in the road, she immediately took them in the house to protect them. Given the Pittengers' animosity towards Lebda and Greuling, Lebda and Greuling did not feel comfortable walking the documents over to the Pittengers' house for fear of retribution or an allegation of trespass. They called counsel to see how they should proceed. Since it was around 7:00 p.m., counsel instructed them not to look at the materials and to keep them safe until first

thing in the morning, which Lebda and Greuling had already decided to do anyway. Counsel sent a staff member to retrieve the package first thing the next morning and contacted Mr. Davies to let him know what happened. The package was delivered in its entirety to Mr. Davies' office before 10:00 a.m. Lebda and Greuling never viewed the contents of the package or kept any of its contents. After the package was returned to Mr. Davies, there was no communication regarding issue until on or around June 14, 2019, when Mr. Davies asked for a written description of what had taken place. The undersigned responded in writing on June 21, 2019 regarding Lebda and Greuling's position and to describe the sequence of events that took place. Mr. Davies also questioned both Lebda and Greuling about the financial document incident during their depositions, and the matter seemed to be resolved.

Counsel received their letter dated September 10, 2019 from Joseph Schouten of Ward and Smith, P.A. in Raleigh, N.C. **(Attached hereto as Exhibit A).** The letter contained a proposed complaint very similar to the recent filing from Mr. Davies **(Attached hererto as Exhibit B)** and made various demands of Lebda and Greuling. Counsel responded to the letter on or about September 20, 2019 **(Attached hereto as Exhibit C).** An agreement was reached through email correspondence between Mr. Shouten and Mr. Wilder regarding Mr. Shouten's request to view the drone videos and any photographs to assess the viability of the Pittengers' claim. The parties agreed that providing these photos or videos did not amount to publication under Section 15A-300.1. **(Attached hereto as Exhibit D).** On October 3, 2019, the undersigned provided the drone videos and the still photographs taken by a photographer (not a drone operator) to Mr. Schouten so that his client could view them and see that no one came upon the Pittenger property and that no pictures of people were made. The videos were a potential demonstrative exhibit for trial. Lebda and Greuling did not hire the drone operator or

photographer, nor were they involved with the drone filming or its schedule in any way. Counsel for Lebda and Grueling did what the Pittengers' counsel did, namely created what was intended to be demonstrative evidence for possible use at trial. If anything, the Pittengers' complaint regarding the drone filming was a discovery dispute that could have been resolved by the Court, and it certainly doesn't rise to the level of a matter for a lawsuit.

Defense counsel advised the Pittengers' counsel that the Pittengers had engaged in the same conduct earlier in the litigation when conducting discovery by flying a drone over their property without permission in June of 2018. Also, on at least one occasion, the Pittengers dispatched surveyors onto the Lebda/Greuling property without obtaining the proper consent, essentially sending third parties to trespass onto their property. Mr. Davies became involved with discussions to resolve the issues at some point in the Fall of 2019. On or around November 4, 2019, the Pittengers made a settlement proposal to Lebda and Greuling. That offer was rejected, and a counterproposal was made. The settlement discussions ceased prior to the summary judgment hearing in December 2019, and nothing else was mentioned about these new claims until May 11, 2020.

Despite having argument before the court on December 10, 2019 on several dispositive motions, Mr. Davies failed to mention anything to the Court surrounding these issues or that a motion to file a supplemental pleading was imminent. The undersigned did not hear anything else from the Pittengers until Mr. Davies sent correspondence on or about May 11, 2020 asking if Lebda and Greuling would consent to his motion to supplement their complaint. The undersigned for Lebda and Greuling responded that they could not consent to the proposed amendment and would be contesting their motion. After this, the Pittengers still waited an entire month to file their motion to supplement the complaint, on June 16, 2020. (ECF No. 77).

LEGAL ARGUMENT

"Rule 15(d) provides that '[u]pon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which may have happened since the date of the pleading sought to be supplemented.'" *Zagaroli v. Neill*, 2017 NCBC LEXIS 103 *42 (Superior Court, Catawba County, November 7, 2017) citing N.C. Gen Stat. § 1A-1, Rule 12(d). "A motion to serve a supplemental pleading is left to the discretion of the trial court." *Id*. at *42. Rule 15(d) "'permits but does not require a trial court to allow a supplemental pleading.'" *Id*. at *42 quoting *Deutsch v. Fisher*, 32 N.C. App. 688, 692 (1977). The Court must weigh if a substantial injustice would result from granting the motion, and "courts 'should focus on any resulting unfairness which might occur to the party opposing the motion.'" *Id*. at *43 quoting *Van Dooren v. Van Dooren*, 37 N.C. App. 333, 337 (1978).

"Additionally, federal decisions interpreting Rule 15(d) of the Federal Rules of Civil Procedure, which is substantially similar to Rule 15(d) of the North Carolina Rules, have concluded that motions to supplement a pleading under Federal Rule 15(d) are governed by the same standards as motions to amend under Federal Rule 15(a)." *Id*. at *43 citing *Franks v. Ross*, 313 F.3d 184, 198 (4th Cir. 2002). "Acceptable reasons for which a motion to amend may be denied are undue delay, bad faith, dilatory motives, repeated failure to cure deficiencies, undue prejudice and futility of the amendment." *Nationsbank of N.C., N.A. v. Baines*, 116 N.C. App. 263, 268 (1994) (citations and quotation marks omitted); *Brown v. Secor*, 2019 NCBC LEXIS 85, *4 (Superior Court Cleveland County, February 28, 2019)(The Court denied Plaintiff's motions for leave to amend, ruling the motion was "unreasonably delayed" and prejudicial when it was filed after discovery closed and was based on documents produced well before the motion

to amend was set before the Court). In *Zagaroli*, the Court found that allowing the "supplemental pleading would unfairly prejudice Defendants" in that it would require "additional discovery. . . .which would inevitably lead to additional costs" and the pleading would be futile because the allegations set forth did not correctly set forth a cognizable and legally viable cause of action. *Zagaroli,* 2017 NCBC LEXIS at *47.

The lateness of the Pittengers' filing, or undue delay, is probably the strongest reason to deny the Pittengers' motion. First, the motion to supplement was made months after the close of discovery. The Pittengers were aware of the purported causes of action at the latest in May 2019 and August 2019, yet they have waited at least seven months after Lebda and Greuling rejected their settlement demands to file their motion. Because the time for discovery is long since over, defendants would have to seek leave of the court to reopen discovery. This case has already been pending for over twenty-four months, and extensive and expensive discovery has been completed. Dispositive motions have been argued. If these defendants win their motion for summary judgment, then the case would be over as to them. If they lose that motion, then the case would be ready for trial with no further discovery. Requiring defendants to continue fighting a case that they believe should be dismissed, or, if they do not prevail on their pending motions, set for trial, is the very definition of substantial injustice. We also note that all the facts regarding the alleged new causes of action were well known to the Pittengers when the dispositive motions were argued on December 10, 2019. A complaint had already been prepared and delivered to Lebda and Greuling's counsel on September 10, 2019. It seems that advising the Court that a forthcoming substantive motion was in the works would have been appropriate.

As noted, the purported claims do not relate to the main issue in this case, that is, whether the Lebda house complies with the relevant restrictive covenants. It seems to these defendants

that allowing this motion could result in confusion to a trier of fact in that the issues raised are so different than those of the original suit. Prejudice to these defendants could result because these unrelated claims serve as a red herring to make them look bad. Further, standing alone, would not confer jurisdiction upon the Business Court.

"The tort of invasion of privacy by intrusion into seclusion has been recognized in North Carolina and is defined as the intentional intrusion 'physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns. . . .[where] the intrusion would be highly offensive to a reasonable person.'" *Tillet v. Onslow Mem. Hosp., Inc*., 215 N.C. App. 382, 384 (2011) quoting *Toomer v. Garrett*, 155 N.C. App. 462, 479 (2002). "Examples of recognized intrusion upon seclusion include 'physically invading a person's home or other private place, eavesdropping by wiretapping or microphones, peering through windows, persistent telephoning, unauthorized prying into a bank account, and opening personal mail of another.'" *Id*. at 384 quoting *Toomer*, 155 N.C. App. at 480. *Keyzer v. Amerilink, Ltd*., 173 N.C. App. 284,289 (2005)(The Plaintiffs' claims were dismissed in this case because the court found their allegations failed to set forth any facts that 'defendants had investigated their personal affairs; had spied on, observed, or otherwise obtained any information about their private concerns.")

The second count alleged by the Pittengers' for intrusion upon seclusion is not only untimely and dilatory but futile. There is no evidence that there were any photographs taken of the interior of the Pittengers home. Further, there is no evidence that the Pittengers private affairs or concerns were intruded upon. In fact, the only photographs taken were by a photographer on the ground and of the exterior of the home. There were no still photographs taken by the drone, and the Pittengers are aware of this. The photographer never stepped onto their property and certainly never took photographs through any windows that would reveal any

private affairs. The drone videos never crossed onto the Pittengers property and merely shows the exterior of the home from the middle of Baltusrol Road and the back side of Quail Hollow Golf Course. The Pittengers cannot claim an invasion of privacy when these were simply taken to potentially be used at a trial for which they have asked. The conduct alleged in the Pittengers' supplemental complaint clearly does not rise to the level of an intrusion upon seclusion tort even taking their allegations as true, which they are not. Allowing this pleading to move forward is going to result in Rule 12(b)(6) motions practice, and a potential Rule 11 motion, given the futility and legally baseless claims asserted by the Pittengers. That in turn is going to cause unnecessary expense and a complete delay in adjudicating the original claims.

If the court grants this motion, Lebda and Greuling will be forced to decide whether to file their own counterclaim. The Pittengers had drones fly over the Lebdas property in June, 2018 without seeking express permission from Lebda and Greuling or their counsel. In other words, they did precisely what they complain that Lebda and Greuling did but did it first. Furthermore, on at least one occasion, the Pittengers had surveyors enter upon the land of Lebda and Greuling without permission for the purpose of surveying their property, and that would be a trespass. Lebda and Greuling had been inclined to forgo any action against the plaintiffs, but if the supplemental complaint is allowed, Lebda and Greuling will have to seriously consider filing their own claims as a defensive matter. That would also necessitate further discovery and further delay all these proceedings.

The Pittengers set in motion a suit against their next-door neighbors and HOA, as well as its officers, over two years ago. While the matter is emotional for all, the case has been litigated thoroughly and in a professional manner. The parties need a resolution of the case that is ready for final disposition or trial. Adding additional causes of action at this point in the litigation

would be confusing to a trier of fact, expensive to all parties, and result in substantial delay.

CONCLUSION

For the foregoing reasons, Lebda and Greuling respectfully request that the Court enter an Order denying the Pittengers' Motion for Leave to Supplement Their Complaint.

This the 25th day of June, 2020.

/s/Raboteau T. Wilder, Jr.
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BUSINESS COURT RULE 7.8 CERTIFICATION

Undersigned counsel certifies that this brief complies with the word limit set forth in Rule 7.8 of the General Rules of Practice and Procedure of the North Carolina Business Court.

This the 25th day of June, 2020.

/s/Raboteau T. Wilder, Jr,
Raboteau T. Wilder

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing document was filed with the Court on the date set forth below via the Court's electronic filing system, which sends notice to all counsel of record:

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This the 25th day of June 2020.

/s/Raboteau T. Wilder, Jr,
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